No. 05-493

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

CAPITAL CASE

In *Boyde* v. *California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the so-called "unadorned factor (k)," which directs juries to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This Court found jurors would reasonably understand this instruction to encompass mitigating factors unrelated to the crime itself, such as the defendant's background and character.

In this case, the Ninth Circuit Court of Appeals held that the use of this same instruction violated the Eighth Amendment of the United States Constitution because it likely misled the jurors to believe they were forbidden from considering background and character evidence relating to "forward-looking" considerations about the defendant's future prospects if sentenced to life in prison.

The questions presented are:

1. Does *Boyde* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2. Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989)?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

Belmontes' Murder of Steacy McConnell 2

The State Court Trial and Appeal 3

Federal Proceedings 8

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE* 18

A. *Boyde* Establishes That California's Factor (k) Instruction Permits Consideration Of Any Relevant "Good Character" Evidence Offered In Mitigation 19

B. The Ninth Circuit's Artificial Parsing Of Good Character Evidence Into "General Character" And "Forward-Looking" Evidence Is Inconsistent With *Boyde* And This Court's Other Eighth Amendment Jurisprudence 21

TABLE OF CONTENTS – Continued

Page

C. Even If "General Good Character" Were Distinguishable From "Forward-Looking Good Character," The Instructions On Mitigating Evidence Given In This Case Did Not Preclude Consideration Of Any "Forward-Looking" Evidence Offered In Mitigation 21

D. The Ninth Circuit's Finding Of An Eighth Amendment Violation In This Case Cannot Be Reconciled With The Controlling *Boyde* Standard For Assessing Ambiguous Instructions 34

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989) 41

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES

Belmontes v. *California*, 488 U.S. 1034 (1989) 8, 42

Belmontes v. *Woodford*, 350 F.3d 861 (9th Cir. 2003) 1

Belmontes v. *Woodford*, 359 F.3d 1079 (9th Cir. 2004) 1

Blystone v. *Pennsylvania*, 494 U.S. 299 (1990) 33

Boyde v. *California*, 494 U.S. 370 (1990) ..... *passim*

Brown v. *Belmontes*, 125 S.Ct 1697, 161 L.Ed.2d 518 (2005) 1, 13

Brown v. *Payton*, 544 U.S. 133 (2005) ..... *passim*

Buchanan v. *Angelone*, 522 U.S. 269 (1998) 32, 39

Butler v. *McKellar*, 494 U.S. 407 (1990) 42, 47

California v. *Brown*, 479 U.S. 538 (1987) 31

Cupp v. *Naughten*, 414 U.S. 141 (1973) 32, 39

Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 22, 43, 45

Graham v. *Collins*, 506 U.S. 461 (1993) 42, 45, 46

Hitchcock v. *Dugger*, 481 U.S. 393 (1987) 43

Hughes v. *Borg*, 898 F.2d 695 (9th Cir. 1990) 38

Johnson v. *Texas*, 509 U.S. 350 (1993) ... 26, 29, 31, 32, 33, 44

Jurek v. *Texas*, 428 U.S. 262 (1976) 30

Lambrix v. *Singletary*, 520 U.S. 518 (1997) 46

Lockett v. *Ohio*, 438 U.S. 586 (1978) ..... *passim*

McKoy v. *North Carolina*, 494 U.S. 433 (1990) 44

O'Dell v. *Netherland*, 521 U.S. 151 (1997) 45, 47

Penry v. *Lynaugh*, 492 U.S. 302 (1989) 22, 33

TABLE OF AUTHORITIES – Continued

Page

People v. *Bacigalupo*, 6 Cal.4th 457 (1993) 37

People v. *Belmontes*, 45 Cal.3d 744 (1988) 1

People v. *Crittenden*, 9 Cal.4th 83 (1994) 38

People v. *Frierson*, 25 Cal.3d 142 (1979) 44

Saffle v. *Parks*, 494 U.S. 484 (1990) 45, 47

Sawyer v. *Smith*, 497 U.S. 227 (1990) 47

Simmons v. *South Carolina*, 512 U.S. 154 (1994) 46

Skipper v. *South Carolina*, 476 U.S. 1 (1986) .....*passim*

Stringer v. *Black*, 503 U.S. 222 (1992) 42

Teague v. *Lane*, 489 U.S. 288 (1989) .....*passim*

Tennard v. *Dretke*, 542 U.S. 274 (2004) 26

Tuilaepa v. *California*, 512 U.S. 967 (1994) 6

TXO Production Corp. v. *Alliance Resources Corp.* 509 U.S. 443 (1993) 38

Weeks v. *Angelone*, 528 U.S. 225 (2000) 38

CONSTITUTIONAL PROVISIONS

United States Constitution Eighth Amendment .....*passim*

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 12

California Penal Code, § 190.2(a) 3

California Penal Code, § 190.3 ..... 2, 3

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Federal Rules of Appellate Procedure, rule 35(c) 14

Federal Rules of Appellate Procedure, rule 40(1)..... 14

OTHER AUTHORITIES

California Jury Instructions, Criminal (CALJIC) No. 1.03..... 38

California Jury Instructions, Criminal (4th ed. 1979) CALJIC No. 8.84.1..... 6, 32, 33

Webster's Unabridged Dictionary (2nd ed. 1979)..... 28

PETITIONER'S BRIEF ON THE MERITS

Robert Ayers[1], Acting Warden of California State Prison at San Quentin (the State) respectfully submits petitioner's brief on the merits.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals following remand by this Court is reported as *Belmontes* v. *Brown*, 414 F.3d 1094 (9th Cir. 2005) (*Belmontes II*). Pet. App. (P.A.) at 230a-320a. This Court's prior order granting certiorari and remanding to the Ninth Circuit is reported as *Brown* v. *Belmontes*, 125 S.Ct 1697, 161 L.Ed.2d 518 (2005). The opinion of the Ninth Circuit preceding remand by this Court is reported as *Belmontes* v. *Woodford*, 359 F.3d 1079 (9th Cir. 2004) (*Belmontes I*). P.A. at 1a-84a. The order of the District Court is unreported. P.A. at 101a-146a.

The opinion of the Supreme Court of California on direct appeal is reported as *People* v. *Belmontes*, 45 Cal.3d 744, 755; P.2d 310; 248 Cal.Rptr.2d 126 (1988), *cert. denied*, 488 U.S. 1034 (1989). P.A. at 147a-229a.

STATEMENT OF JURISDICTION

A panel of the Ninth Circuit entered judgment granting habeas corpus relief on July 15, 2005. The State filed a

[1] Steven Ornoski is no longer warden of San Quentin State Prison. The acting warden is now Robert Ayers.

petition for writ of certiorari on October 12, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

California Penal Code section 190.3 provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

STATEMENT OF THE CASE

Belmontes' Murder of Steacy McConnell

On March 15, 1981, respondent Fernando Belmontes armed himself with a metal dumbbell bar and went to burglarize the home of 19-year-old Steacy McConnell in Victor, California. Steacy was home when Belmontes arrived. After entering the house and discovering Steacy, Belmontes savagely beat her with the metal bar, severely fracturing her skull with about 20 blows and causing

approximately 15 gaping wounds to the side of her head. After delivering these fatal blows, Belmontes stole Steacy's stereo equipment.

Belmontes explained to his two accomplices who had been waiting outside in a getaway car that he had to "take out a witness." Later that afternoon, Belmontes sold Steacy's stereo for $100, split the money with his accomplices to the crime, and used some of it to buy beer.

Meanwhile, Steacy's parents came to her home and found their daughter lying unconscious in a pool of blood. Steacy died shortly afterward from cerebral hemorrhaging caused by the blows to her head. P.A. at 150a-154a.

The State Court Trial and Appeal

Following a trial in the San Joaquin County Superior Court, a jury found Belmontes guilty of first-degree murder. The jury also found true a statutory "special circumstance" rendering Belmontes eligible for the death penalty under California law. Cal. Pen. Code, § 190.2(a). P.A. at 242a.

Belmontes' trial proceeded to a penalty phase, in which the trier of fact determines whether to impose a sentence of death or life imprisonment without the possibility of parole. Cal. Pen. Code, § 190.3. The prosecutor introduced evidence in aggravation of five instances of Belmontes' violent or criminal conduct: his theft of a handgun in early 1979; his carrying the gun during the same time period; his 1979 conviction as an accessory to voluntary manslaughter; his commission of aggravated assault and battery against his pregnant girlfriend the month preceding Steacy's murder; and an assault he

committed while he was a ward in a county youth facility. The prosecution also presented aggravating evidence of autopsy photographs depicting the nature and extent of Steacy's fatal injuries. P.A. at 197a-199a.

In mitigation, the defense presented evidence of Belmontes' impoverished, unstable, and abusive upbringing; his caring and wholesome relationships with a number of decent friends and family members; and his good performance during a prior commitment to the California Youth Authority (CYA). This latter category of evidence related in part to Belmontes' participation in a church-related "M-2" sponsorship program provided at CYA. This evidence was offered to show that Belmontes had maintained more good relationships with decent people, that he had made a legitimate religious conversion, and that he therefore was a "salvagable" person who would be able to assist other inmates if committed to prison for life. J.A. at 4-115.

Both parties acknowledged that the jury could, and should, consider Belmontes' future prospects. Belmontes himself testified and asked the jury for a sentence of life in prison because, he said, "there is an opportunity to achieve goals and try to better yourself" in prison. He asked the jury to spare his life so he could "try to improve" himself. J.A. at 163-164. In closing statement, defense counsel argued that, in light of the evidence of Belmontes' prior CYA commitment, he could "fit[] into the system" and "contribute something" in the future. J.A. at 170. The prosecutor also acknowledged that the jury could and should consider Belmontes' future prospects of a life in prison in determining the proper punishment: "And I think that value to the community [in the future] is

something that you have to weigh in. There's something to that." J.A. at 155.

The trial court instructed the jury pursuant to California's then-existing standard instruction in capital cases. The particular instruction given here provided:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of any criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the defendant acted under extreme duress or the substantial domination of another person.
>
> (f) The age of the defendant at the time of the crime.

> (g) *Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.*[2]

Cal. Jury Instructions, Criminal, No. 8.84.1[3] (4th ed. 1979) (CALJIC); J.A. at 183-184 (emphasis added). Belmontes expressly asked that the final catch-all portion of the instruction be given. J.A. at 137.

The trial court also gave the jury the following "special instruction."

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> However, *the mitigating circumstances which I have read for your consideration are given to you*

---

[2] The instruction was taken verbatim from California Penal Code section 190.3, and many of the listed factors could serve as either aggravating or mitigating circumstances, depending on what the trier of fact found. See *Tuilaepa* v. *California*, 512 U.S. 967, 978-79 (1994). The final catch-all factor, designated in this case as "factor (g)," is commonly referenced as "factor (k)" according to its statutory designation. See *Boyde* v. *California*, 494 U.S. at 373-74. To remain consistent with the text of the statute, the terminology employed in the lower court decision in this case, and the discussion concerning this instruction in *Boyde*, this final catch-all factor shall be referred to hereinafter as "factor (k)."

[3] CALJIC No. 8.84.1 has been amended at various times, and the factor (k) instruction is no longer phrased as it was when Belmontes was sentenced.

> *merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes.* You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

J.A. at 185-186 (emphasis added).

During jury deliberations, the trial court conducted a brief, informal exchange with the jurors in response to some of their questions:

> Juror Hern: The statement about the aggravation and mitagation (sic) of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process.

A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The court responded, "That is something you cannot consider in making your decision." J.A. at 191.

The jurors went back to their deliberations and ultimately returned a verdict of death. J.A. at 199-202.

On appeal to the California Supreme Court, Belmontes claimed that the factor (k) instruction given in his case improperly foreclosed consideration of background and character evidence unless it related to the offense itself.

Belmontes also argued that the trial court's responses to Juror Hern's inquiry about the "listing" and "balancing" of mitigating factors reinforced his claims that the California capital scheme might impermissibly require jurors to weigh the evidence in favor of death and did not allow them to consider sympathy for the defendant.

The California Supreme Court rejected these claims, finding the instructions and arguments, taken as a whole, fully and properly defined the scope and nature of the jury's sentencing responsibilities. P.A. at 202a-206a.

Belmontes' petition for certiorari was denied. *Belmontes* v. *California*, 488 U.S. 1034 (1989).

Federal Proceedings

After Belmontes' judgment became final, this Court in *Boyde* v. *California*, 494 U.S. 370, addressed the constitutional sufficiency of the factor (k) instruction. The Court rejected the claim that the factor (k) instruction limited the jury to evidence relating to the crime itself and did not allow for consideration of non-crime-related mitigating evidence. The *Boyde* Court held that there was no reasonable likelihood that jurors would interpret the factor (k) instruction to prevent consideration of mitigating evidence of background and character. *Id.* at 381-382.

On November 4, 1994, Belmontes filed an amended petition for writ of habeas corpus in the United States District Court for the Eastern District of California. As was true on direct state appeal, Belmontes raised no claim in federal habeas about the constitutional sufficiency of the factor (k) instruction for purposes of informing the jurors of their ability to consider evidence of his potential

future prospects as a life prisoner. Instead, the amended petition renewed Belmontes' claim that the trial court's answers to Juror Hern's mid-deliberation questions about the "listing" and "balancing" of mitigating factors led the jurors to misunderstand the proper scope of their sentencing determination, despite the other instructions previously given.

The district court rejected this claim, explaining that the overall instructions were sufficient to dispel any possible confusion and that neither the juror's inquiry, nor the court's comments, suggested a "misunderstanding or repudiation of these instructions." Citing *Boyde*, the district court concurred with the California Supreme Court: "the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities." P.A. at 140a-141a.

On appeal to the Ninth Circuit Court of Appeals, Belmontes again claimed that the trial court's responses to Juror Hern's questions misled the jurors about the proper scope of their sentencing responsibilities. J.A. at 207-214, 224-235. A majority of a three-judge panel reversed Belmontes' penalty judgment. The opinion, authored by Judge Reinhardt and joined by Judge Paez, found prejudicial error under the Eighth Amendment based on the instructions regarding the various circumstances the jurors were told they could consider in determining Belmontes' sentence.

Though acknowledging that this Court in *Boyde* had approved the factor (k) instruction, the majority treated *Boyde's* holding as limited to cases in which the evidence in mitigation consists of general information about the defendant's "background and character" offered to "tend to

explain why the defendant committed the crime." P.A. at 58a. The instruction was constitutionally insufficient in this case, according to the panel majority, because it failed to inform the jurors that they could consider the proffered evidence of Belmontes' former commitment to CYA in determining whether he might adjust well to a life in prison. P.A. at 58a-60a.

The majority concluded that the asserted facial inadequacy of the factor (k) instruction, coupled with the trial judge's informal answers to Juror Hern's and Juror Hailstone's questions during deliberations, was reasonably likely to have misled the jurors to believe they were forbidden to consider evidence offered by Belmontes to show he "would live a productive life if permanently incarcerated in a structured environment." P.A. at 65a.

Judge O'Scannlain dissented, concluding that the majority's reasoning rested on a threefold misapplication of *Boyde*. First, *Boyde's* holding made it "perfectly clear" that all of Belmontes' proffered evidence in mitigation fell squarely within the ambit of the factor (k) instruction. Second, given the overall evidence and the uncontested arguments on both sides at the trial, any chance of the jury not appreciating the permissible scope of Belmontes' proffered evidence was "pure fantasy." P.A. at 76a. And third, in light of the overall instructions, there could be no reasonable likelihood, as required under *Boyde*, that the jury applied the factor (k) instruction in such a way as to foreclose consideration of any constitutionally-relevant evidence. Quoting *Boyde*, Judge O'Scannlain found that any such conclusion would turn the entire penalty-phase "into a virtual charade." P.A. at 82a (quoting *Boyde*, at 383).

The State's petition for en banc rehearing (J.A. at 236-252) was denied. Eight judges dissented from the order denying en banc rehearing, two of them issuing published opinions. Judge Callahan reiterated the concerns expressed by Judge O'Scannlain and added her view that the majority's reasoning amounted to a belated and unsupportable affront to the California Supreme Court's well-considered conclusion in this case. P.A. at 85a-96a. Judge Bea joined Judge Callahan's opinion and added two additional criticisms. First, Judge Bea objected to the panel majority's suggestion that the jurors should have been instructed to consider "mitigating" evidence bearing on Belmontes' probable future conduct (P.A. at 16a, 59a, 64a), reasoning that any such instruction characterizing specific evidence as "mitigating" would constitute an improper, argumentative comment on the evidence by the trial court. P.A. at 96a-97a. Second, Judge Bea concluded that the panel majority, in finding the factor (k) instruction to be insufficient, had misquoted and mischaracterized the instruction's language. Specifically, Judge Bea said that the majority had improperly interpreted the instruction's phrase "extenuates the gravity of the crime" to mean "extenuates [Belmontes'] culpability for the crime." P.A. at 58a. Judge Bea reasoned that factors which might "extenuate the gravity of a crime" can encompass "the extent that the criminal shows remorse, repents, or rehabilitates himself." P.A. at 97a-99a.

Thereafter, on April 30, 2004, the State sought certiorari in this Court. The State's petition for certiorari presented the same two questions raised herein.

While the State's petition was pending, this Court issued its opinion in *Brown* v. *Payton*, 544 U.S. 133 (2005). In *Payton*, the Ninth Circuit had struck down a death

judgment, finding that the California Supreme Court's opinion in that case did not pass muster under AEDPA. See 28 U.S.C. § 2254. The Ninth Circuit said that the state court had improperly relied on *Boyde* to find that the factor (k) instruction allowed for jury consideration of post-crime evidence of a defendant's religious conversion and good behavior in prison. *Boyde* was also inapposite, in the Ninth Circuit's view, because "the prosecutor in Payton's case misstated the law and the trial court did not give a specific instruction rejecting that misstatement." *Payton*, at 140-141.

In reversing the Ninth Circuit's decision, this Court held that the California Supreme Court had reasonably relied on *Boyde* because "*Boyde* established that [the factor (k)] does not limit the jury's consideration of extenuating circumstances solely to circumstances of the crime." *Boyde* "expressly rejected the suggestion that factor (k) precluded the jury from considering evidence pertaining to a defendant's background and character because those circumstances did not concern the crime itself." *Id.* at 141-142. This Court noted:

> After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.

Id. at 142-143. Although this Court found that the prosecutor improperly argued that the factor (k) instruction did not permit consideration of Payton's post-crime evidence, the Court nonetheless held that the California Supreme Court reasonably applied *Boyde* to conclude that, considering "the whole context of the trial," the improper prosecutorial argument "did not put Payton's mitigating evidence beyond the jury's reach." *Id.* at 144.

On March 28, 2005, this Court granted certiorari and remanded this case to the Ninth Circuit for further consideration in light of *Payton*. *Brown* v. *Belmontes*, 125 S.Ct 1697, 161 L.Ed.2d 518. In an opinion issued on July 15, 2005, the same Ninth Circuit panel majority again granted Belmontes habeas relief on the penalty phase judgment, citing the exact reasons set forth in its previous decision. P.A. at 230a-304a.

Despite this Court's remand for reconsideration in light of *Payton*, the majority asserted that *Payton* was inapplicable. While acknowledging "the similarity of the factual and legal issues" in *Belmontes* and *Payton*, the majority nonetheless found that *Payton* was not controlling because it had been decided under the deferential-review standard of AEDPA. Because *Belmontes* is not governed by AEDPA, the majority determined that it was free to "reach[] an independent legal judgment as to the constitutionality of the challenged instruction." P.A. at 231a-233a.

Judge O'Scannlain again dissented on the same grounds he raised in the earlier decision. He further stated that this Court's decision in *Payton* virtually foreclosed any chance of constitutional error here. P.A. at 304a-319a.

After the time for seeking rehearing in the circuit court had passed (Fed. R. App. P. 35(c), 40(1)), the Ninth Circuit issued a sua sponte order on August 2, 2005, for the parties to submit briefing setting forth their respective positions on whether the case should be reheard en banc. J.A. at 267. On October 24, 2005, the Ninth Circuit decided not to rehear the matter en banc. Seven judges dissented, including Judge Callahan, who issued an opinion finding that the panel majority's decision could not be reconciled with *Boyde* or *Payton*. J.A. at 290-299.

SUMMARY OF ARGUMENT

The primary issue in this case concerns this Court's holding in *Boyde* v. *California*, 494 U.S. 370, interpreting the constitutional sufficiency of California's catch-all factor (k) instruction, which directs jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In *Boyde*, this Court rejected a claim that this instruction limited the jury's consideration of mitigating evidence to the circumstances of the crime itself, holding that factor (k) also encompassed relevant evidence of a defendant's background and character. *Id.* at 381-382.

Belmontes' penalty phase case consisted entirely of background and character testimony. His character evidence was offered to show, among other things, that he was likely to adjust well to prison and perhaps contribute favorably in the future based on his performance during a prior juvenile CYA commitment. As in *Boyde*, the factor (k) instruction allowed the jurors to consider all such character evidence as perhaps extenuating the gravity of the

crime for purposes of their sentencing determination. Indeed, *Boyde* so obviously controls this case that Belmontes did not even assert to the Ninth Circuit that factor (k) prevented the jurors from considering any of his proffered mitigating evidence.

The Ninth Circuit nonetheless made an independent determination that factor (k) *does not* allow consideration of good character evidence. Interpreting *Boyde's* holding regarding factor (k) as being limited to character evidence bearing on a defendant's *culpability* for the crime, the Ninth Circuit concluded that the instruction violated the Eighth Amendment principles of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and its progeny because it allegedly did not permit consideration of "future-looking" prospects unrelated to culpability.

This conclusion, which divides "good character" evidence into discrete "culpability" and "forward-looking" components, defies common sense. For purposes of a capital sentencing determination, evidence of "good character" is virtually always "forward looking" because, apart from some inference about the defendant's present or future prospects, such evidence has little if any mitigating value.

The Ninth Circuit's conclusion is also irreconcilable with *Boyde*, which held that factor (k) was not limited to the circumstances of the crime itself. The circuit court's holding cannot logically be squared with a conclusion that *Boyde* limited factor (k) to evidence relating solely to culpability. Indeed, if the distinction between different forms of "good character evidence" were valid, the factor (k) instruction would have been insufficient to pass constitutional muster with respect to Boyde's "strength of

character" evidence, offered for the "forward-looking" purpose of showing that his crime was an aberration from otherwise good character. *Boyde*, at 381-382, n. 5.

Furthermore, even if there were some valid distinction between "general" and "forward-looking" good character evidence, the standard instruction in this case allowed consideration of all such "forward-looking" evidence. In making the solemn determination between life and death, jurors would reasonably interpret the directives to "consider all the evidence" and to take account of "any other circumstance that extenuates the gravity of the crime" to allow consideration of a defendant's character as possibly revealing worthwhile future prospects. They certainly would not believe they were *forbidden* from considering such evidence. Indeed, this Court's recent decision in *Payton* confirms that courts would reasonably rely on *Boyde* to find that factor (k) allowed consideration of "forward-looking" evidence of post-crime good behavior in prison. *Brown* v. *Payton*, 544 U.S. at 141-143. Moreover, this same general instruction's directive to take account of "the age of the defendant" allowed consideration of Belmontes' youth to show that, with time and maturity, he might adjust well in the future if sentenced to life. The standard instruction, therefore, was sufficient for the jury to give effect to the "forward-looking" implications of Belmontes' evidence of prior institutional adjustment.

Indeed, even if *Boyde* and *Payton* had not both *directly addressed* the *exact* instruction at issue, both of those cases would still compel a finding that the instructions given in this case, viewed in totality, *at least allowed* the jury to consider and give effect to Belmontes' proffered evidence. In addition to the standard instruction given in *Boyde* and *Payton*, the jurors in this case were given a

special instruction that informed them specifically that the previous instructions merely set forth "examples of some of the factors" to be considered in mitigation and that any one factor in mitigation "standing alone may support a decision that death is not the appropriate punishment in this case." The prosecution and the defense both openly acknowledged that the jury could and *should* consider Belmontes' future favorable prospects as mitigating evidence. There is virtually no chance – let alone a "reasonable likelihood," as required under *Boyde* – that the jury felt precluded from considering any of Belmontes' mitigating evidence.

Finally, the Ninth Circuit has violated the non-retroactivity doctrine of *Teague* v. *Lane* in holding that factor (k) does not extend to so-called "forward-looking" character evidence. Consistent with the *Lockett* line of cases, Belmontes was allowed to present any relevant character evidence he wished, and nothing affirmatively precluded the jury from considering any such evidence. There was no authority at the time Belmontes' judgment was pending that would have dictated the Ninth Circuit's conclusion regarding factor (k). Indeed, in light of *Boyde's* subsequent holding that factor (k) encompasses character evidence, it was at least debatable whether the instruction extended to so-call "forward-looking" character evidence. Nor was there any controlling precedent to dictate the Ninth Circuit's distinction between different forms of good character evidence. Indeed, the subsequent *Payton* decision reveals that it was at least reasonable to conclude that factor (k) applied to "forward-looking" evidence of good prison behavior.

ARGUMENT

I

THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE*

Belmontes' proffered evidence in mitigation all falls squarely within the holding of *Boyde* v. *California*. Belmontes' evidence of his performance during a prior juvenile commitment represents good character evidence that, within the meaning of California's factor (k) instruction, would "extenuate[] the gravity of the crime even though it is not a legal excuse for the crime." As this Court held in *Boyde*, California's factor (k) instruction does not limit a jury's consideration of mitigating factors to those relating to the crime itself but rather permits consideration of evidence unrelated to the crime, such as a defendant's background and character, that might mitigate the punishment the defendant should receive.

In this case, however, the Ninth Circuit panel majority adopted an unsupportably narrow interpretation of *Boyde*, which limits factor (k)'s reach to background and character evidence relating *exclusively* to the defendant's *culpability* for the charged offense. Because Belmontes' character evidence, which was offered in part to show likely prospects for good institutional adjustment, did not fit neatly within the narrow confines of "culpability," the panel majority found that such evidence was outside the scope of *Boyde* and beyond the reach of factor (k).

The panel majority's holding cannot be reconciled with *Boyde* or with logic. As was true in *Boyde*, the factor (k) instruction provided constitutionally sufficient guidance to allow consideration of all of Belmontes' proffered "good

character" evidence. Moreover, given the overall instructions in this case, there is virtually no chance – let alone a reasonable likelihood – that the jurors believed they were precluded from considering any relevant evidence in mitigation.

A. *Boyde* Establishes That California's Factor (k) Instruction Permits Consideration Of Any Relevant "Good Character" Evidence Offered In Mitigation

The central issue in *Boyde*, as in this case, was whether California's "catch-all" mitigation instruction, factor (k), limited the jury to consideration of mitigation evidence directly related to the crime in violation of the Eighth Amendment's requirement that a jury "consider and give effect to all relevant mitigation evidence" offered by the defendant. *Boyde*, 494 U.S. at 377-78. Boyde argued "[t]hat the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to *non-crime-related mitigation evidence*, because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (emphasis in original and added). This Court rejected Boyde's contention.

Considering the instruction "standing alone," this Court held there was no reasonable likelihood "that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.* at 380-81. The Court explained: "The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstances *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes background and character." *Boyde*, 494

U.S. at 382 (emphasis in original). Thus, this Court held that California's "catch-all" mitigation instruction was constitutional, on its face, because it permitted – indeed, it "directed" – consideration of "any other circumstance" in mitigation that might extenuate the gravity of the crime. *Id.* at 380-82.

The Court in *Boyde* further held that "[e]ven were the language of the [catch-all] instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation." *Boyde*, 494 U.S. at 383. Examining the other instructions given to the jury, the Court concluded: "When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all *non-crime-related* evidence [in mitigation]." *Id.* at 383 (emphasis added).

Belmontes' case in mitigation consisted of evidence of his impoverished, unstable, and abusive upbringing; his caring and wholesome relationships with a number of decent friends and family members; and his good performance during a prior commitment to CYA. Thus, Belmontes' mitigation evidence, like that in *Boyde*, did not relate directly to the circumstances of the crime. Rather, the evidence concerned Belmontes' background and character. In particular, the evidence of Belmontes' behavior while incarcerated in the past, offered in part to demonstrate good prospects for institutional adjustment, constituted evidence of his good character. *Skipper* v. *South Carolina*, 476 U.S. 1, 7 (1986) ("a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character . . . ").

As this Court held in *Boyde*, the factor (k) instruction given in this case directed the jury "to consider *any other circumstance* that might excuse the crime, which certainly includes background and character." *Boyde*, at 382 (original emphasis). The mitigation evidence presented in this case consisted entirely of Belmontes' background and character.

Thus, Belmontes' mitigation case, revolving around his background and character, falls squarely within the holding of *Boyde*. As in *Boyde*, the jury in this case was "directed to consider any other circumstance" such as background and character that might extenuate the gravity of the crime. In other words, the factor (k) instruction permitted the jury to consider Belmontes' mitigation evidence, which is all that the Eighth Amendment requires.

B. The Ninth Circuit's Artificial Parsing Of Good Character Evidence Into "General Character" And "Forward-Looking" Evidence Is Inconsistent With *Boyde* And This Court's Other Eighth Amendment Jurisprudence

Because "character" evidence – at least "good character" evidence – is virtually always presented to establish some inference about the defendant's likely present or future prospects, such evidence logically can have little if any relevance in mitigation aside from its potential "forward-looking" implications. In overturning Belmontes' death judgment, the Ninth Circuit panel majority nonetheless concluded that *Boyde's* analysis of the factor (k) instruction did not extend to any "forward-looking" character evidence.

Instead, the panel majority asserted that *Boyde's* approval of the factor (k) instruction was limited solely to "mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense." Because "forward-looking" character evidence, unrelated to *actual culpability*, was allegedly outside the scope of factor (k), the panel majority concluded that the instruction violated the general requirements of *Lockett* v. *Ohio*, 438 U.S. 586, *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), and *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), and the specific dictate of *Skipper* that "the jury must consider a defendant's past conduct as indicative of his probable future behavior." P.A. at 290a.

The panel majority's reasoning is both irreconcilable with the fundamental holding in *Boyde* and is inconsistent with logic. By its plain terms, *Boyde's* finding regarding the scope of the factor (k) instruction is not limited to evidence bearing solely on the defendant's *culpability* for the charged offense. To the contrary, *Boyde* recognized that when the factor (k) instruction is considered in light of the other instructions given (which were also all given in this case), reasonable jurors would in fact realize they were to consider all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383.

This Court in *Boyde* held that factor (k), which *directed* the jury to consider *any other circumstance which extenuates the gravity of the crime*, would certainly be understood to "include[] a defendant's background and character." *Id.* at 382. This Court has never said anything to support the panel majority's artificial parsing of

character evidence into discrete components of (1) "general" character, relating solely to culpability and (2) "forward-looking" character, relating to future prospects. To the contrary, *Skipper* impliedly rejected, as being "elusive," any distinction between mitigating evidence of a defendant's past good behavior and his future prospects of good behavior. *Skipper*, 476 U.S. at 6-7.[4]

Indeed, a significant portion of the proffered evidence in *Boyde*, which this Court found all to be within the ambit of the factor (k) instruction, was in fact "forward-looking." The *Boyde* Court rejected any claim that factor (k) precluded consideration of the defendant's "impoverished and deprived childhood, his inadequacies as a school student, *and his strength of character in the face of these obstacles.*" *Boyde*, 494 U.S. at 382 (emphasis added).

Boyde's purported "strength of character" in the face of such difficulties would have little if any meaningful relevance in mitigation if considered *only* in connection with his *culpability* for the underlying offense. This sort of "strength of character" evidence would relate naturally – and perhaps exclusively – to a defendant's "forward-looking" future prospects. Indeed, it is difficult to imagine any other reason why such evidence might have any significant mitigating value for purposes of a jury's sentencing determination.

The Court's discussion in footnote 5 of the *Boyde* decision further confirms factor (k)'s application to all

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[4] Indeed, the relevant character evidence that was improperly excluded in *Lockett* consisted in large part of the defendant's forward-looking "prognosis for rehabilitation" coupled with her successful drug treatment. *Lockett*, 438 U.S. at 594.

relevant character evidence. Footnote 5 responded to Boyde's claim that factor (k) precluded the jury from considering evidence that he had won a dance prize while previously incarcerated. Boyde argued that such evidence was germane under *Skipper* v. *South Carolina* to show that he "could lead a useful life behind bars."

The Court rejected this claim because, among other reasons, such evidence related to Boyde's character strengths in the face of his earlier troubles and, therefore, was simply more "good character evidence" that factor (k) allowed the jury to consider as extenuating "the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Boyde*, 494 U.S. at 382, n. 5.

Boyde's dancing achievement during his prior incarceration certainly did not diminish his *personal culpability* for the murder itself, but such evidence theoretically might have "extenuated" the "gravity" of that culpability for sentencing purposes because it related to his general character. Indeed, to the extent that any of Boyde's character evidence might have shown his crimes to be an "aberration from otherwise good character," such evidence had no meaningful value in mitigation except to show that, based on his "otherwise good character," he was unlikely to engage in such "aberrant" conduct in the future. Like all of Boyde's proffered "strength-of-character" evidence, this evidence was, therefore, advanced simply to show that Boyde's life was worth saving.

Any inquiry about whether a potential capital defendant is "worth saving" is, by definition, "forward-looking." For purposes of a capital sentencing determination, it is difficult to imagine how general evidence of

"good character" could have any appreciable significance apart from the defendant's likely present or future prospects.

Belmontes' "forward-looking" evidence in mitigation was no different. As Judge O'Scannlain explained in dissent, the evidence supporting Belmontes' argument of future institutional adjustment consisted solely of testimonials regarding his background and character during his CYA commitment, and "*Boyde* makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k)." P.A. at 306a. There is nothing in *Boyde* to suggest, as the panel majority found, that *Boyde's* holding did not encompass the mitigation evidence offered in this case.

A defendant might, of course, offer mitigating evidence of his personal traits or qualities that has no bearing on his present or future prospects but relates exclusively to his culpability.[5] Such a defendant might also present evidence to show that, irrespective of his "forward-looking" prospects, his life should be spared because he was somehow *once* a good person or had *once* performed good deeds or achieved worthwhile accomplishments. However, to the extent that such evidence does not bear on the defendant's *present or future prospects*, it is not evidence of his "*good character*"; absent some inference that such evidence relates to favorable "forward-looking"

[5] For example, a defendant might present evidence that, based on his personal characteristics, his crime was somehow the result of impulsiveness, mental deficiency, drug-induced psychosis, irrational tendency to react violently, propensity to follow others, etc.

prospects, it is merely "background" evidence that might provide an excuse for a sentence less than death.

For these reasons, evidence of a capital defendant's "good character" is virtually always "forward-looking" in some sense. Once again, *Boyde* expressly held that the factor (k) instruction provided sufficient guidance for jurors to consider a defendant's proffered character evidence. To the extent that evidence with no bearing on a defendant's present or future prospects might be interpreted as "character evidence" at all, there is nothing in *Boyde* to support the panel majority's view that factor (k) limits a jury's consideration to this small subspecies of "non-forward-looking" evidence, relating exclusively to actual culpability for the charged crime.

Indeed, this Court has consistently adopted a broad interpretation of the scope of mitigating "character evidence" and has never limited such evidence to the narrow "culpability" confines that the Ninth Circuit has read into *Boyde*. As noted above, the Court in *Skipper* acknowledged that evidence of a defendant's prior incarceration, offered to show a likely future of conformity in prison, is in fact a form of character evidence: "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character. . . . " *Skipper*, 496 U.S. at 7; see also *Tennard* v. *Dretke*, 542 U.S. 274, 285 (2004) (good character traits are not "typically traits to which criminal activity is attributable"); *Johnson* v. *Texas*, 509 U.S. 350, 369 (1993) (rejecting the argument that consideration of likely future behavior in prison is distinguishable from an assessment of moral culpability for the crime already committed).

In short, the panel majority's decision to strike down Belmontes' penalty judgment rests on an illusory distinction between "general good character" evidence and "forward-looking good character" evidence. Such a distinction is both logically untenable and irreconcilable with this Court's fundamental holding in *Boyde*.

C. Even If "General Good Character" Were Distinguishable From "Forward-Looking Good Character," The Instructions On Mitigating Evidence Given In This Case Did Not Preclude Consideration Of Any "Forward-Looking" Evidence Offered In Mitigation

Even assuming the existence of some meaningful distinction between "general character evidence" and "forward-looking character evidence," the standard instruction given in this case provided sufficient guidance to allow consideration of Belmontes' potential for "forward-looking" future institutional adjustment. The panel majority reasoned that *Boyde* is inapplicable in this case because Belmontes' evidence was not offered merely "to explain why the defendant committed the crime." P.A. at 292a. In this vein, the majority insisted that the language of the catch-all factor (k) instruction does not encompass "those forward-looking considerations" such as "evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment." P.A. at 293a.

Once again, this conclusion is logically untenable and is inconsistent with *Boyde*. As Judge Bea noted in dissent (P.A. at 98a-99a), the panel majority's finding that the factor (k) instruction would not be understood to encompass "forward-looking" evidence rests on an artificially

constrictive interpretation of the phrase "extenuates the gravity of the crime." "Extenuate" is defined as, "To lessen, to diminish; to weaken. . . . " Webster's Unabridged Dictionary (2nd ed. 1979).

Background and character evidence offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, while *perhaps* unrelated to the defendant's *culpability* for his offenses, would nonetheless be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Simply put, if jurors believed a defendant would present no future problems and might somehow *contribute* to society if sentenced to life, they would certainly realize such "extenuating" factors might diminish the "gravity" of the underlying crime for purposes of their sentencing determination. Logically, this instruction would, therefore, inform reasonable jurors that they could consider such evidence in determining whether a judgment of death was warranted or appropriate. As this Court noted in *Boyde*, jurors would naturally consider such background and character evidence as extenuating the gravity of the crime "even though it is not a legal excuse for the crime. . . . " *Boyde*, at 382 n. 5.

This Court's recent decision in *Payton* further confirms that jurors would understand the factor (k) instruction as encompassing evidence bearing on a defendant's likely post-crime behavior or character:

> After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the

> crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.

Payton, at 1439. In fact, *Payton* found that *Boyde's* interpretation of factor (k) was controlling precedent with respect to "forward-looking," post-crime evidence even where the prosecutor repeatedly and improperly argued, with no curative admonition from the trial court, that the jurors were *forbidden* from considering *any* of Payton's "forward-looking" evidence in mitigation. *Id.* at 1437-39.

Payton's reasoning applies with equal force to the "forward-looking" evidence presented by Belmontes. Background and character evidence, offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, would be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Indeed, such a "forward-looking inquiry *is not independent of an assessment of moral culpability.*" *Johnson* v. *Texas*, 509 U.S. at 369 (emphasis added).

In its effort to distinguish *Boyde*, the panel below emphasized the *Boyde* Court's recognition of "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" P.A. at 289a; *Boyde* at 352 (original emphasis). The panel majority declared that society has no "long held view" about the mitigating effect of a defendant's likely future conduct. Therefore, reasoned the panel, "in the absence of a clear instruction on point, jurors are not likely to be

aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor." P.A. at 293a.

This pronouncement – that absent a clear instruction on the matter, jurors would not otherwise consider a defendant's future prospects for nonviolent institutional adjustment – is at odds with common sense, inconsistent with this Court's previous views on the matter, and irrational in light of the record. Consideration of a defendant's potential future conduct is a long-established feature of the criminal justice system. "[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek* v. *Texas*, 428 U.S. 262, 275 (1976). Indeed, this Court in *Skipper* expressly found that the consideration of a defendant's prior good behavior in prison, offered as indicative of his character for probable future conduct if sentenced to life in prison, "is an *inevitable* . . . element of criminal sentencing that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 5 (emphasis added); see also *Payton*, 544 U.S. at 140 (describing the Ninth Circuit's conclusion regarding the jury's view of institutional adjustment evidence as mere "supposition" without precedential support).

There is virtually no chance any jury would simply disregard such an "inevitable" element of its sentencing determination and make an "elusive" distinction that precludes consideration of a defendant's future adaptability to prison. *Skipper* at 7. There is certainly no chance that the jurors did so in this case. As Judge O'Scannlain summarized in dissent, the jury heard, without objection, several witnesses testify about Belmontes' prior experience

in CYA. Belmontes himself asked the jury for a life-in-prison sentence based on his future prospects and goals. Belmontes' counsel and the prosecution *both* effectively and unambiguously argued that, in light of the evidence of Belmontes' background, the jury could and *should* consider his future prospects of a life in prison in determining the proper punishment. Neither the trial court nor any of the parties or witnesses said anything to countermand the clear message that the jury could consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects.

As Judge O'Scannlain noted in dissent, the panel majority's view that the jury nonetheless felt constrained to reject all such evidence and argument necessitates a finding "that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes' lawyer were not smart enough to realize they were all mistaken." P.A. at 311a. As was true in *Boyde*, reasonable jurors would not have believed the court's instructions somehow "transformed all of this 'favorable testimony [and unrebutted argument] into a virtual charade.'" P.A. at 317a; *Boyde*, at 383-84 (quoting *California* v. *Brown*, 479 U.S. 538, 542 (1987); see also *Payton*, at 1440 ("like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all").

The jurors here, plainly aware of the gravity of their sentencing decision, would have rationally given broad meaning to the directive to "consider all the evidence" in arriving at a judgment of life or death. J.A. at 183; see *Johnson* v. *Texas*, 509 U.S. at 370 (a capital jury is aware of the consequences of its determination and is likely to

give an expansive view of the mitigating evidence); *Buchanan* v. *Angelone*, 522 U.S. 269, 278 (1998) (even if instructions were unclear as to whether jury could consider particular mitigating evidence, it was unlikely that jurors disregarded it in light of instruction to consider "all the evidence"). It is certainly *unreasonable* to believe that the jurors nonetheless refused to consider Belmontes' proffered evidence, in contravention of everything that had been presented and said, based on an alleged ambiguity in factor (k)'s wording.

Indeed, any chance of the jurors misreading the factor (k) instruction to foreclose consideration of Belmontes' evidence is even more remote in view of the entire instruction. *Boyde*, at 378 (citing *Cupp* v. *Naughten*, 414 U.S. 141 (1973)). In addition to factor (k)'s directive to consider "[a]ny other circumstance which extenuates the gravity of the crime," the standard CALJIC 8.84.1 instruction also directed the jurors to "consider all of the evidence" and to take account of several factors, including "[t]he age of the defendant at the time of the crime." J.A. at 183-184; *Boyde*, at 373, n. 1.

The instruction to take account of Belmontes' youth[6] naturally allowed the jurors to consider his future prospects. As the Court explained in *Johnson* v. *Texas*, 509 U.S. at 350, "It strains credibility to suppose that [a] jury would [view] evidence of [a defendant's] youth as outside its effective reach" in determining whether the defendant would continue to be violent in the future. *Id.* at 368. By parity of reasoning, a jury instructed to consider a

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[6] Belmontes was one month shy of age 20 when he murdered Steacy McConnell. P.A. at 199a.

defendant's age would understand that youth might be relevant in determining whether the defendant would continue to be dangerous in the future.

If the jurors found that Steacy McConnell's murder was somehow attributable to the "transient qualities of [Belmontes'] youth," they would certainly realize his potential for future violence might well subside with the benefit of time and maturity. *Johnson*, at 370. The jurors would "readily comprehend" that the "ill effects of youth," which are "subject to change," could be germane in evaluating Belmontes' future prospects. *Id.* at 369. In making such a determination, the jurors certainly would not "have deemed themselves foreclosed from considering" Belmontes' proffered evidence relating to "future dangerousness." *Id.* at 370. Having been told to consider Belmontes' youth, the jury naturally would have also considered the proffered evidence of his prior CYA commitment as tending to show that, with the benefit of age, he "would likely live a productive life if permanently confined within a structured prison environment." P.A. at 293a.

The directive to take account of the defendant's age was, therefore, sufficient by itself to permit the jury to "consider and give effect" to Belmontes' future prospects as a life prisoner. The Eighth Amendment requires no more. *Blystone* v. *Pennsylvania*, 494 U.S. 299, 304-05 (1990); *Penry* v. *Lynaugh*, 492 U.S. at 328. In any event, in light of the instructions to "take account of the defendant's age" and to consider "all the evidence," no rational juror would have misinterpreted the factor (k) instruction's directive to consider "any other circumstance which extenuates the gravity of the crime" to foreclose consideration of any so-called "forward-looking" character evidence. As was true in *Boyde*, the standard CALJIC 8.84.1 instruction in this

case was facially sufficient to allow consideration of all Belmontes' proffered mitigating evidence.

D. The Ninth Circuit's Finding Of An Eighth Amendment Violation In This Case Cannot Be Reconciled With The Controlling *Boyde* Standard For Assessing Ambiguous Instructions

In assessing whether California's factor (k) instruction violates the Eighth Amendment, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, at 380. In making this determination, the "single instruction . . . may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, at 378.

The panel majority's finding of a "reasonable likelihood" of error underscores the Ninth Circuit's confusion concerning the controlling *Boyde* standard. Indeed, if the overall instructions and arguments in this case were somehow insufficient to inform jurors they could consider Belmontes' mitigating evidence, the "reasonable likelihood" standard set forth in *Boyde* would be all but meaningless.

Even if it were assumed that factor (k) was insufficient by itself, the additional instructions in this case clearly informed the jurors that they could consider *any* mitigating factor established by the evidence, including Belmontes' likely future institutional adjustment. In addition to the court's orders to (1) "consider all the evidence," (2) take account of "[t]he age of the defendant," and (3) take account of [a]ny other circumstance which

extenuates the gravity of the crime" (J.A. at 183-184), the jurors were given the following "special instruction":

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> *However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.*

J.A. at 185-186 (emphasis added).

The panel majority unjustifiably concluded that this special instruction "exacerbated" the jury's alleged "confusion." The majority focused exclusively on the instruction's second paragraph, finding that the second and third sentences somehow served to undermine and contradict the plain meaning of the first sentence, which informed the jurors that the enumerated mitigating circumstances were "merely examples of some of the factors" they could consider in mitigation. P.A. at 294a.

No reasonable juror could have interpreted this special instruction as the panel majority insists. The first paragraph expressly told the jurors that they were

forbidden from considering *any factor in aggravation* beyond those which had been specifically enumerated and defined. Conversely, the only rational reading of the second paragraph's first sentence is that the jury's determination of mitigating factors *was not limited* to those expressly enumerated. Logically, the jurors could only conclude that they were free to consider other factors not enumerated. Moreover, the only reasonable interpretation of the directive to "pay careful attention to each of these factors," and the explanation that "any one of them standing alone may support a decision that death is not the appropriate punishment," is that the jury should consider *any* mitigating factor it found *whether expressly listed or not.* Jurors would "naturally" and "inevitably" consider Belmontes' "past conduct as indicative of his proper future behavior." *Boyde*, at 382 n. 5; *Skipper*, at 5.

As Judge O'Scannlain recognized, in light of this special instruction, there could be "little doubt that the court conveyed the message that the enumerated factors were not the exclusive mitigating circumstances that the jury could consider." P.A. at 314a. Similarly, as Judge Callahan noted, any chance of the jury misinterpreting this special instruction as the panel majority speculates "defies logic." P.A. at 89a.

The *Belmontes* majority also erroneously found that the trial judge somehow "compounded the problem" with his informal answers to juror questions during deliberations.[7] P.A. at 295a-299a. For the reasons discussed,

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[7] Although the trial judge's answers to Juror Hern's questions provided the *sole* basis of Belmontes' claim of instructional error in the district court and in his Ninth Circuit appeal, they have now been

(Continued on following page)

however, there simply was no "problem" to compound. The jurors were expressly told that their consideration of any possible mitigating factors was unlimited.

In any event, there is no reasonable likelihood the trial court's answers to the jurors misled them. Juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that was the listing." The court replied, "That was the listing, yes, ma'am." Juror Hern then asked, "Of those certain factors we were to decide one or the other and then balance the sheet?" The court replied, "That is right. It is a balancing process." A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The court responded, "That is something you cannot consider in making your decision." J.A. at 191.

Juror Hern's inquiry did not convey a misunderstanding about the factors to be considered in the penalty phase deliberations. Her use of the word "listing" did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically enumerated. Nor did her use of the metaphor, "balance the sheet," convey an unconstitutionally restrictive understanding of the jury's role in penalty phase determinations. Indeed, the trial court's answer to Juror Hern's question properly characterized the balancing process of penalty phase determinations under California law. See *People* v. *Bacigalupo*, 6 Cal.4th 457, 470; 862 P.2d 808, 815; 24 Cal.Rptr.2d 808, 815 (1993). The court's comment not to consider possible

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relegated to a "supporting role" in this newfound challenge to the factor (k) instruction.

psychiatric treatment in prison was also correct under California law because no evidence even remotely relating to the matter had been presented. *People* v. *Crittenden*, 9 Cal.4th 83, 143-44; 885 P.2d 887, 922; 36 Cal.Rptr.2d 474, 509 (1994); see also CALJIC 1.03.[8]

As Judge Callahan understood in a way the panel majority failed to see, these juror inquiries do not necessarily establish any jury confusion but rather "just as easily show that the jury was taking its duty seriously before reaching a verdict." Furthermore, the trial court's responses to these questions were all correct statements of law. P.A. at 91a-92a.

In any event, during this same informal conference with the jurors, the court directed them to "go over the instructions again with one another." J.A. at 190. The trial court's directive to review the previous instructions would have cured any possible confusion. See *Weeks* v. *Angelone*, 528 U.S. 225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves). The previous instructions, of course, unambiguously informed the jurors (1) that they were to "consider all of the evidence which has been received during any part of the trial," (2) that they were to consider "[a]ny other circumstance which extenuates the gravity of the

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[8] See P.A. at 316a-317a (O'Scannlain, J., dissenting) (citing *Hughes* v. *Borg*, 898 F.2d 695, 700 (9th Cir. 1990) (jurors' duty confined to considering only the evidence presented in open court); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) ["Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, a jury is bound to consider only the evidence presented to it in arriving at a judgment."]).

crime even though it is not a legal excuse for the crime," and (3) that potential mitigation factors were not limited to those that had been enumerated. Neither the court nor the parties ever said anything to suggest that the jurors were limited or in any way restricted from using any mitigating evidence in any way they saw fit.

To the contrary, defense counsel and the prosecutor both clearly acknowledged that the jurors could and *should* consider Belmontes' likely future prospects as a life prisoner when making their penalty determination. Because both parties agreed that the jury should consider Belmontes' character evidence as relating to his future prospects, there is no reasonable likelihood that the jurors nonetheless believed they were precluded from considering any of that evidence. See *Buchanan* v. *Angelone*, 522 U.S. at 278-279.

In *Boyde*, this Court warned that, although there is a strong policy for accurate sentencing determinations in capital cases, "there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, at 380. This Court has also held that a theoretical or abstract claim of improper jury instructions is insufficient to establish constitutional error. *Cupp* v. *Naughten*, 414 U.S. at 147-49.

The claimed error here is, at best, speculative and theoretical. As in *Boyde*, the factor (k) instruction did not preclude the jurors from considering any evidence in mitigation. Like the evidence in *Boyde*, the evidence here related to Belmontes' character, specifically his character for passive conformity in an institutional setting. As in *Boyde*, factor (k) informed the jurors they could consider any such evidence. As in *Payton*, there is no reasonable

chance that the factor (k) instruction, even standing alone, would be misinterpreted to preclude consideration of "forward-looking" considerations based on probable post-crime behavior. *Payton*, at 1439-40.

Moreover, as this Court also observed in *Boyde*:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde, at 380-81. The Ninth Circuit's finding of constitutional instructional error relies entirely on legal hairsplitting, with no regard for a commonsense understanding of the overall instructions and without consideration of what actually occurred in the penalty-phase trial. In light of the overall particulars here, no reasonable juror would have made the "elusive" distinction between past conduct and future behavior suggested by the majority. *Skipper*, at 6-7.

Even assuming some possible ambiguity in the factor (k) instruction, the jurors here were clearly instructed (1) that they were not limited to any preordained mitigating circumstances and (2) that their finding of any single mitigating circumstance, whether expressly enumerated or not, could be sufficient to support a decision that the death penalty was inappropriate. Moreover, the closing statements by both the prosecution and the defense made it clear that the jury was to consider and weigh all of Belmontes' mitigating evidence, including his future prospects in prison.

The jurors in this case very clearly understood they could consider any evidence in mitigation and give any such evidence whatever weight they felt it deserved. There is virtually no chance, let alone a reasonable likelihood, the jurors interpreted or applied the instructions here to prevent them from considering any relevant evidence in mitigation. There simply is no rational basis to conclude that the judgment in this case rests on an Eighth Amendment violation.

II

THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989)[9]

In granting Belmontes federal habeas relief, the panel majority interpreted the Eighth Amendment to impose requirements never established or even contemplated by this Court when Belmontes' judgment became final. Recognizing the general principle, set forth in *Lockett* and

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[9] The State did not invoke *Teague* in its brief to the Ninth Circuit, and the panel majority's opinion contains no *Teague* analysis. This is because Belmontes' claim in the district court and on Ninth Circuit appeal concerned solely the propriety of the trial judge's responses to Juror Hern's questions. J.A. at 207-214, 224-235. Indeed, the panel majority acknowledged that Belmontes had not challenged the sufficiency of the factor (k) instruction: "Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hern, the Court has held that we must examine claims of instructional error in light of the record as a whole." P.A. at 291a-292a. Accordingly, the State had no opportunity or reason to address the current *Teague* issue until after the panel majority issued its decision. The State *did* invoke *Teague* at the first opportunity in its petition for rehearing following the panel's initial decision. J.A. at 235-252.

its progeny, that a state may not affirmatively preclude a jury's consideration of relevant mitigating evidence, the circuit court concluded that California's factor (k) instruction violated the Eighth Amendment because it allegedly precluded consideration of so-called "forward looking" evidence.

This interpretation of the Eighth Amendment effectively relies on a "new rule" which was not dictated by precedent when Belmontes' judgment became final. At the very least, the panel majority has applied the *Lockett* line of cases in a "novel" manner that is incompatible with *Teague*.

Under *Teague*, a defendant may not receive federal habeas relief based on a new rule of federal constitutional law not "dictated by precedent existing when the judgment in question became final." *Stringer* v. *Black*, 503 U.S. 222, 227-29 (1992); *Butler* v. *McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288. Even when the asserted basis of a constitutional violation does not rest on a "new rule," habeas relief is still precluded where the prior precedent upon which it relies is applied in a "novel setting." *Stringer*, at 228; *Butler*, at 414-15. "The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if reasonable jurists may disagree." *Graham* v. *Collins*, 506 U.S. 461, 476 (1993) (quoting *Stringer*, at 238, Souter, J., dissenting).

Belmontes' judgment became final when this Court denied certiorari of his direct appeal on January 17, 1989. *Belmontes* v. *California*, 488 U.S. 1034. Prior to that time, no precedent dictated the circuit court's conclusion regarding

the federal constitutional sufficiency of the factor (k) instruction.

In *Lockett* v. *Ohio*, a plurality of the Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of his character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (original emphasis, footnote omitted.) Later, in *Eddings* v. *Oklahoma*, a majority of the Court applied *Lockett* to hold that a sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114 (original emphasis).

Consistent with *Lockett* and *Eddings*, the Court in *Skipper* v. *South Carolina* struck down a death judgment where the sentencing court refused to consider evidence of a defendant's post-crime behavior in jail to demonstrate his likely future adaptability to prison. *Skipper*, 476 U.S. at 4-5. As the *Skipper* Court properly held, the exclusion of such evidence violated *Lockett* and its progeny because "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7. As of 1987, the rule was that "the sentencer" may not refuse to consider or be instructed not to consider any nonstatutory mitigating circumstances. *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987).

Indeed, in subsequent cases the Court has confirmed that:

> *Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute

> manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.

Johnson v. *Texas*, at 361 (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 456 (1990), Kennedy, J., concurring).

Nothing in the *Lockett* line of cases dictated the Ninth Circuit's conclusion regarding any alleged shortcomings of California's factor (k) instruction. The factor (k) instruction given in this case recited verbatim the language of the California statute, which permits consideration of all mitigating evidence. *People* v. *Frierson*, 25 Cal.3d 142, 178; 559 P.2d 587, 608; 158 Cal.Rptr.2d 281, 301-302 (1979). Consistent with *Lockett* and its progeny, Belmontes was allowed to present in mitigation whatever relevant background and character evidence he wished. None of the instructions in this case *expressly prohibited* the jury from considering or giving effect to any of that mitigating evidence, and no authority extant while Belmontes' judgment was pending dictated the conclusion that factor (k) would be misunderstood to preclude consideration of any such evidence. The panel majority's finding of an Eighth Amendment violation in this case is, therefore, barred under *Teague*.

If any doubt remained on this point, this Court's holding in *Boyde*, issued after Belmontes' judgment was final, put such concerns to rest. Because *Boyde* affirmed the constitutionality of the factor (k) instruction, even "standing alone," with respect to background and character evidence unrelated to the charged crime (*Boyde*, at 381), it is inconceivable "that all reasonable jurists," prior to *Boyde*, would have nevertheless "deemed themselves

compelled to accept" the Ninth Circuit's view that factor (k) violated the Eighth Amendment by misleading jurors to ignore so-called "forward-looking" character evidence. *Graham*, at 477.

In light of the subsequent *Boyde* decision, it certainly cannot be said that the *Lockett* line of cases dictated the Ninth Circuit's holding regarding the factor (k) instruction's purported constitutional infirmity. Indeed, this Court has held that *Teague* barred similar attempts to extend *Lockett*. See, e.g., *Saffle* v. *Parks*, 494 U.S. 484, 488-490 (1990) (because the defendant was allowed to present all relevant mitigating evidence, *Lockett* and *Eddings* did not dictate a finding of error based on the fact that the jury was instructed not to consider such evidence for purposes of sympathy); *Graham* v. *Collins*, 506 U.S. at 470-477 (because the defendant was allowed to present relevant mitigating evidence of family background and positive character traits, which the jury could consider under Texas' three "special issues," *Lockett* and its progeny did not dictate a finding of constitutional error even though such evidence might have had mitigating value beyond the three statutory "special issues"). Nothing in the *Lockett* line of cases compelled a finding that factor (k) prohibited consideration of so-called "forward-looking" character evidence.

Indeed, no precedent extant while Belmontes' judgment was pending dictated, or even supported, the Ninth Circuit's distinction between different forms of "general" and "forward-looking" evidence of good character. To the contrary, the *Skipper* Court rejected any distinction between behavior bearing on a defendant's past character and behavior bearing on "future adaptability" as being "elusive." *Skipper*, at 7; see also *O'Dell* v. *Netherland*, 521

U.S. 151 (1997) (*Skipper's* holding that juries must be allowed to consider evidence that a defendant would not pose a future danger in prison did not dictate, under *Teague*, *Simmons*'[10] later holding that juries must be allowed to consider evidence that a defendant will be ineligible for parole if sentenced to life); *Graham*, 506 U.S. 476 (no reason to regard the circumstance of a defendants age as being distinguishable from the circumstances of his family background and positive character traits because "virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' ").

Again, in light of *Boyde's* subsequent holding that factor (k) permitted consideration of the defendant's "strength of character" evidence (*Boyde*, at 381-382), the instruction's application to "forward-looking" character evidence was at least "susceptible to debate among reasonable minds" when Belmontes' judgment was pending. *Graham*, at 476. *Payton* reinforces this conclusion. Because it was *at least reasonable* for the state court to conclude that *Boyde* applied to Payton's "forward-looking" post-crime evidence (*Payton*, at 141-143), it was also reasonable to conclude, even before *Boyde*, that factor (k) permitted consideration of Belmontes' "forward-looking" evidence of prior institutional adjustment. It would not have been "apparent to all reasonable jurists" at that time that the instruction at issue violated the Eighth Amendment. *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997). There certainly was no precedent at the time Belmontes' judgment became final that would have compelled all

[10] See *Simmons* v. *South Carolina*, 512 U.S. 154 (1994).

reasonable jurists to distinguish *Boyde* and *Payton* to find an Eighth Amendment violation in Belmontes' case. The Ninth Circuit's decision to grant habeas relief in this case was not dictated by earlier precedent and, therefore, is barred under *Teague*.

Neither of *Teague's* two narrow exceptions apply here. The panel majority's holding clearly does not qualify under the first *Teague* exception. The circuit court's conclusion regarding the scope of California's factor (k) instruction does not seek "to decriminalize a class of conduct [ ]or prohibit the imposition of capital punishment on a particular class of persons." *Saffle*, 494 U.S. at 494-495 (citing *Butler*, 494 U.S. at 415; *Teague*, 489 U.S. at 311).

Teague's second exception, affording retroactive application for "watershed rules of criminal procedure," is also inapplicable here. The rule announced by the Ninth Circuit, that declares the factor (k) instruction to be constitutionally insufficient to allow consideration of the "forward-looking" implications of a defendant's proffered evidence of good character, certainly does not amount to a landmark "watershed" rule of the sort contemplated by *Teague*. Even assuming that the Ninth Circuit's constitutional analysis were correct, this conclusion certainly would not alter our basic understanding of the "bedrock procedural elements" essential to "the fairness of a proceeding." *O'Dell* v. *Netherland*, 521 U.S. at 167; *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990); *Teague*, at 311.

CONCLUSION

For the reasons set forth herein, the State respectfully submits that the judgment of the Ninth Circuit should be reversed.

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